DEPARTMENT OF STATE REVENUE

04-20200372.LOF

Letter of Findings: 04-20200372
Gross Retail and Use Taxes
For the Year 2014, 2015, and 2016

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Utility Company was required to collect sales tax from customers from whom Utility Company did not possess a current ST-109 exemption certificate; the Department disagreed with Utility Company that it was relieved of its responsibility to collect the tax on the ground that certain customers may have consumed the electricity in an exempt manner. Utility Company's construction and equipping of a battery storage facility was not exempt from sales or use tax because the facility did not generate electricity but was a non-exempt component of Utility Company's distribution network.

ISSUES

I. Gross Retail Tax - Exempt Utility Customers.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4 et seq.; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; *Wendt LLP v. Indiana Dep't of state Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, (Ind. Tax Ct. 2007); 45 IAC 2.2-2-2; 45 IAC 2.2-3-24; 45 IAC 2.2-3-25.

Taxpayer argues it was not required to collect sales tax on utilities sold to certain customers on the ground that these customers consumed the utility for exempt purposes.

II. Gross Retail and Use Tax - Sampling Taxpayer's Purchases of Tangible Personal Property.

Authority: IC § 6-8.1-3-12.

Taxpayer maintains that the audit's sampling methodology - employed to determine Taxpayer's sales and use tax liability - was flawed resulting in an inflated assessment of sales and use tax.

III. Gross Retail Tax - Purchases of Equipment Used to Generate Electricity.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-3-2(c); IC § 6-2.5-5-3; IC § 6-2.5-5-5.1(a); *Conklin v. Town of Cambridge City*, 58 Ind. 130 (1877); *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); 45 IAC 2.2-4-26(a); 45 IAC 2.2-5-8(c), (g); Sales Tax Information Bulletin 60 (October 2020); Sales Tax Information Bulletin 60 (November 2017); Sales Tax Information Bulletin 60 (July 2006); Revenue Ruling 2012-03ST (July 27, 2012); Revenue Ruling 2009-06ST (June 2, 2009); Black's Law Dictionary (11th ed. 2019); Lump Sum Contracts, https://en.wikipedia.org/wiki/Lump_sum_contract;*Battery Storage Power Station*, https://en.wikipedia.org/wiki/Battery_storage_power_station.

Taxpayer states that it is entitled to an offsetting refund of sales tax paid on the purchase of equipment used to generate electricity.

STATEMENT OF FACTS

Taxpayer is a utility company providing electric services to customers within Indiana and outside Indiana. The Indiana Department of Revenue ("Department") conducted a Gross Retail ("Sales") and Use Tax audit review of Taxpayer's tax returns and business records.

The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed with the assessment

and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Exempt Utility Customers.

DISCUSSION

The Department assessed Taxpayer additional sales tax because the Department was unable to verify that sales of utilities to certain customers were exempt. The issue is whether Taxpayer has established that Taxpayer is not now responsible for paying the uncollected tax.

A. Burden of Proof.

Indiana law imposes on Taxpayer the burden of establishing that the audit assessments were wrong.

As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of state Revenue*, 977 N.E.2d 480, 486, fn. 9 (Ind. Tax Ct. 2012).

Taxpayer, in this instance, is required to collect sales tax on utility sold to its customers pursuant to IC § 6-2.5-2-1 and IC 6-2.5-4 et seq. unless its customers provide properly executed exemption certificates. Taxpayer, as an agent for the state, is responsible for the tax pursuant to IC § 6-2.5-9-3.

B. Missing Exemption Certificates and Mis-Matched Meter Numbers.

The Department's audit found that Taxpayer sold utilities to customers but did not collect sales tax. After further review, the audit found that Taxpayer did not have on file an ST-109 ("Indiana Utility Exemption Certificate") for all of its customers. As a result, Taxpayer was issued an AD-14 "Notice of Noncompliance" form which allowed Taxpayer 30 days to obtain a proof of exemption form ("AD-70") from those customers. Taxpayer did not provide the documentation. According to the audit report, "The taxpayer was unable to provide exemption certificates or other documentation supporting the exemption."

In other instances, Taxpayer was able to provide the requisite ST-109 but the meter number did not match the meter number on the customer invoice. For example, customer A claimed an exemption for electricity sold to meter number 123 but the customer invoice indicated that the electricity was sold through meter number 456.

IC § 6-2.5-8-8 provides in part as follows:

> (a) A person authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
> (b) The following are the only persons authorized to issue exemption certificates:
> (1) Retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter.
> (2) Organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21, IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter.
> **(3) Persons who are exempt from the state gross retail tax under IC 6-2.5-4-5 and who receive an exemption certificate from the department.**
> (4) Other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
> (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
> (d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to

collect gross retail or use tax on the sale unless the seller obtains:
(1) a fully completed exemption certificate; or
(2) the relevant data to complete the exemption certificate;
within ninety (90) days after the sale.
(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:
(1) obtain a fully completed exemption certificate; or
(2) prove by other means that the transaction was not subject to state gross retail or use tax.
(f) **A power subsidiary (as defined in IC 6-2.5-4-5) or a person selling the services or commodities listed in IC 6-2.5-4-5(b) who accepts an exemption certificate issued by the department to a person who is exempt from the state gross retail tax under IC 6-2.5-4-5 is relieved from the duty to collect state gross retail or use tax on the sale of the services or commodities listed in IC 6-2.5-4-5(b) until notified by the department that the exemption certificate has expired or has been revoked. If the department notifies a power subsidiary or a person selling the services or commodities listed in IC 6-2.5-4-5(b) that a person's exemption certificate has expired or has been revoked, the power subsidiary or person selling the services or commodities listed in IC 6-2.5-4-5(b) shall begin collecting state gross retail tax on the sale of the services or commodities listed in IC 6-2.5-4-5(b) to the person whose exemption certificate has expired or been revoked not later than thirty (30) days after the date of the department's notice. An exemption certificate issued by the department to a person who is exempt from the state gross retail tax under IC 6-2.5-4-5 remains valid for that person regardless of any subsequent one (1) for one (1) meter number changes with respect to that person that are required, made, or initiated by a power subsidiary or a person selling the services or commodities listed in IC 6-2.5-4-5(b). Within thirty (30) days after the final day of each calendar year quarter, a power subsidiary or a person selling the services or commodities listed in IC 6-2.5-4-5(b) shall report to the department any meter number changes made during the immediately preceding calendar year quarter and distinguish between the one (1) for one (1) meter changes and the one (1) for multiple meter changes made during the calendar year quarter. Except for a person to whom a blanket utility exemption applies, any meter number changes not involving a one (1) to one (1) relationship will no longer be exempt and will require the person to submit a new utility exemption application for the new meters. Until an application for a new meter is approved, the new meter is subject to the state gross retail tax and the power subsidiary or the person selling the services or commodities listed in IC 6-2.5-4-5(b) is required to collect the state gross retail tax from the date of the meter change.** (Effective July 1, 2015) (**Emphasis added**).

The statute was amended in 2015 by adding IC § 6-2.5-8-8(b)(3) and IC § 6-2.5-8-8(f) as highlighted above in **bold** text:

In instances where Taxpayer was unable to provide a customer exemption certificate, was unable to provide the requested AD-70, and was unable to "provide other documentation supporting the exemption," Taxpayer has provided no basis upon which it should not now be responsible for collecting the tax.

In instances where the "the meter number on the exemption certificate did not match the meter number on the pull list," Taxpayer was permitted during the audit "to provide internal documentation showing meter number changes so the exempted meter could be tied to the pull list." However, Taxpayer has provided no additional argument or documentation then or now establishing that it should not now be responsible for collecting the tax in instances where "the meter number could not be shown to match the meter number on the pull list . . . ."

45 IAC 2.2-3-24 provides that "[a]ll sales of tangible personal property by a retail merchant for delivery in Indiana shall be presumed to be retail transactions for storage, use, or consumption in Indiana." Given that presumption, 45 IAC 2.2-3-25 imposes on Taxpayer "the burden of proving to the contrary also, unless he receives from the purchaser an exemption certificate."

Under either the 2015 version of IC § 6-2.5-8-8 or under the regulations in effect prior, Taxpayer was required to collect sales tax from customers for whom there was no clear, verifiable, documented exemption. 45 IAC 2.2-2-2 provides that in such instances, "The retail merchant acting as an agent for the state of Indiana, must collect the tax."

C. Exempt Manufacturing Companies.

Taxpayer argues that the Department assessed sales tax on the sale of electricity to two different manufacturing

companies. Taxpayer maintains that it was not required to collect sales tax from these companies because they are entitled to purchase electricity which was being used in "direct production" of the businesses' products.

Taxpayer provided a list of its customers arguing that the entities were exempt manufacturers using the electricity in the "direct production" of those customers' products. *See* IC § 6-2.5-5-5.1.

Taxpayer also indicated that certain of its other customers were restaurants entitled to purchase electricity consumed in the direct production of the restaurants' food products. *See* IC § 6-2.5-5-5.1.

Taxpayer argues that the Department failed to notify Taxpayer that these customers were not exempt from sales tax. IC § 6-2.5-8-8(f) in part provides as follows:

> A power subsidiary (as defined in IC 6-2.5-4-5) or a person selling the services or commodities listed in IC 6-2.5-4-5(b) who accepts an exemption certificate issued by the department to a person who is exempt from the state gross retail tax under IC 6-2.5-4-5 *is relieved* from the duty to collect state gross retail or use tax on the sale of the services or commodities listed in IC 6-2.5-4-5(b) *until notified* by the department that the exemption certificate has expired or has been revoked. (*Emphasis added*).

The Department does not believe that Taxpayer was "relieved of the responsibility to collect state gross retail or use tax . . . ." because there is no indication that the customers' exemption certificates had "expired or . . . [were] revoked" which would have triggered the Department's own obligation to notify Taxpayer of the expiration or revocation. Instead Taxpayer asks the Department to abate the assessments attributable to these customers because they are manufacturers or restaurants engaged in qualifying "manufacturing-like" activities." Perhaps so, but the customers might just as well be purchasing utilities for non-exempt purposes such as air conditioning or lighting. The Department is disinclined to take the "leap of logic" required to accept Taxpayer's argument.

In a few instances, Taxpayer indicates that it has obtained ST-109s from some of these customers. To the extent that Taxpayer has presented additional ST-109s, the Department will adjust the proposed assessment to reflect the utility customer's exempt status.

D. Utility Services Sold to Health Care Facility and Blanket Exemption.

Taxpayer maintains that it was not required to collect sales tax from a health care facility because its parent company possess a "blanket exemption." Taxpayer explains that it sold utility to "Family Medicine" but that it possessed a 2004 blanket exemption issued "Health Care Center". Taxpayer has verified that Family Medicine is included in the entities covered by the blanket exemption certificate, and therefore Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer is sustained in part and denied in part. Taxpayer was not required to collect sales tax on the sale of utilities to "Family Medicine." Taxpayer is not required to collect sales tax on the sale of utilities to entities for which Taxpayer has now produced exemption certificates. In all other respects, Taxpayer is respectfully denied.

II. Gross Retail and Use Tax - Sampling Taxpayer's Purchases of Tangible Personal Property.

DISCUSSION

Because Taxpayer made numerous routine purchases during the 2014 through the 2016 audit period, the Department's audit conducted a statistical sampling of those transactions. Accordingly, the Taxpayer "pulled the sample transactions and those were reviewed by the auditor." According to the audit report, the following procedure was then followed.

> If [use] tax was found to be due for a particular purchase, the taxable amount was noted in the pull list workpaper. After reviewing all the sample transactions, the additional taxable purchases were totaled by stratum. These totals were then entered back in the "Use Tax Audit Workpaper" to determine total additional taxable purchases for each period.

In reviewing the sampled transactions, the Department found "areas of noncompliance." As explained in the audit period:

> The [T]axpayer purchased various items in the sample pull list that are not used in direct production of electricity. The purchases included items such as security equipment, office supplies, maintenance tools and equipment, safety equipment, marketing materials, building maintenance, and other items not related to direct production.

In other instances, Taxpayer was unable to produce "documentation or vendor receipts" demonstrating that sales tax paid was paid or that Taxpayer had self-assessed use tax. In addition, the Department's audit assessed additional tax on delivery charges. In those instances, "Sales Tax was paid on the tangible personal property but not charged on the delivery charges."

It is these various instances which led to an assessment of additional use tax to which Taxpayer here objects.

Taxpayer argues that the Department's sampling of its sales was inaccurate on the ground that the sample chosen contained duplicate entries, one of the months chosen for sampling was duplicated, and another month - which should have been in the sampling period - was omitted. Moreover, Taxpayer states that simply correcting the cited errors - e.g., removing duplicate entries - will not correct the flaws inherent in the chosen sample. In effect, Taxpayer believes that the only way to address the issue is by entirely recalculating the sample, e.g. a "do-over."

IC § 6-8.1-3-12 in part states:

> (a) The department may audit any returns filed in respect to the listed taxes, may appraise property if the property's value relates to the administration or enforcement of the listed taxes, may audit gasoline distributors for financial responsibility, and may investigate any matters relating to the listed taxes.
> (b) The department may audit any returns with respect to the listed taxes using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due or amounts to be refunded.

Under IC § 6-8.1-3-12, the Department has the authority to employ a statistical sampling methodology when investigating a taxpayer's business records for tax purposes.

It bears repeating that it was Taxpayer which "pulled the sample transactions" and it was only after Taxpayer did so were those transactions reviewed by the Department's auditor.

Taxpayer now has performed its own alternate calculations using the "Multistate Tax Commission's" software program and by adjusting the "level of confidence" factor downward. According to Taxpayer, its alternate calculation would result in a 15 percent reduction in the pending assessment. (Taxpayer originally requested a 40 percent reduction but has since decided that a 15 percent reduction is warranted.)

Taxpayer's primary objection is that the sample included a duplicate month -April 2015. However, the error is attributable to Taxpayer because it was responsible for preparing the sample and, in this case, provided duplicate files one of which was labeled ""04**15**_Sales Use Tax by Month - Audit Test" and a second file which was labeled as "04**16**_Sales Use Tax by Month - Audit Test." (**Emphasis added**). However, it was later discovered the second file duplicated the contents of the first. The file labeling error was only discovered a year-and-one-half after the audit was begun, and Taxpayer only objected to the results of the sample some two months after the error was discovered, alternatives discussed, and Taxpayer had taken steps to assure that such sampling errors would not be repeated in the future.

Taxpayer's second objection is that 163 vendors were omitted from the sample. However, the omission was discussed with Taxpayer's representatives during the course of the audit. At that time, Taxpayer apparently agreed with the sample as prepared and offered no further objections.

In sum, the only apparent substantive objection is that the April 2015 entries were duplicated. Even though it was Taxpayer's own error which led to the duplication, the Department will - of course - not stand by a numerical calculation which is plainly wrong. However, the duplication is not a simple numerical miscalculation which lends itself to a readily identifiable remedy. Taxpayer's proposed remedy is to reduce the assessment by 15 percent (approximately $250,000) but Taxpayer has provided nothing which ticks-and-ties the duplicate entries to the very specific reduction in tax requested by Taxpayer. Taxpayer invites the Department to speculate on the results of an alternative calculation, but the Department could just as well speculate that eliminating or substituting the April 2016 entries would result in an *additional* assessment of $250,000. Just as there is no substantive reason allowing an administrative decision increasing the assessment, there is nothing in the record which justifies the

Department granting the requested reduction. Therefore, Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c) of proving that the proposed assessment was wrong on this issue.

FINDING

Taxpayer's protest is respectfully denied.

III. Gross Retail Tax - Construction of Battery Energy Storage Facility and Control House.

DISCUSSION

Taxpayer maintains that is entitled to an offsetting refund of use tax it paid on the purchase of equipment used to temporarily store electricity. Taxpayer explains it developed and constructed a "battery energy storage facility." Such a facility is "a type of energy storage power station that uses a group of batteries to store electrical energy." *Battery Storage Power Station*, https://en.wikipedia.org/wiki/Battery_storage_power_station (Last visited October 26, 2020). A battery storage facility, such as Taxpayer's "is used for short-term peak power and ancillary services, such as providing a frequency-response reserve to minimize the chance of power outages." *Id.*

A. Exempt Production Equipment and Facility.

Taxpayer argues that purchases of equipment and supplies utilized in constructing the battery facility are exempt pursuant to IC § 6-2.5-5-3(b) which states:

> Except as provided in subsection (d), transactions involving manufacturing machinery, tools, and equipment, including material handling equipment purchased for the purpose of transporting materials into activities described in this subsection from an onsite location, are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

As further authority, Taxpayer cites to 45 IAC 2.2-5-8(c) and (g):

> (c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they *have an immediate effect on the article being produced*. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.
>
> . . . .
>
> (g) "*Have an immediate effect upon the article being produced*": Machinery, tools, and equipment which are used during the production process and which have an immediate effect upon the article being produced are exempt from tax. Component parts of a unit of machinery or equipment, which unit has an immediate effect on the article being produced, are exempt if such components are an integral part of such manufacturing unit. The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required either by law or by practical necessity does not itself mean that the property "*has an immediate effect upon the article being produced*". Instead, in addition to being essential for one of the above reasons, the property must also be an integral part of an integrated process which produces tangible personal property.

(*Emphasis added*).

For purposes of Indiana's sales and use tax, IC § 6-2.5-5-5.1(a) and IC § 6-2.5-1-27 provide that electricity is defined as tangible personal property.

Generally, electric utilities and the Department recognize three stages in providing electricity to customers: (1) production, (2) transmission, and (3) distribution. "Production" refers to the generation of electricity. "Transmission" involves the transfer of electricity from generating sources to local distribution systems. "Distribution" involves the transfer of electricity from local distribution systems to the customer. *See* Revenue Ruling 2012-03ST (July 27, 2012), 20120829-IR-045120487NRA; Revenue Ruling 2009-06ST (June 2, 2009), 20180131-IR-045180057NRA.

IC § 6-2.5-5-3(c) provides that the exemptions found in IC § 6-2.5-5-3(b) "do not apply to transactions involving distribution equipment or transmission equipment acquired by a public utility engaged in generating electricity."

Taxpayer claims that its battery facility is exempt because it "generates" electricity sold to its utility customers. Taxpayer explains:

> The Battery Energy Storage Facility was created as a generation asset and is a grid-scale Lithium ion battery-base energy storage system which contains a 20 MW array of Lithium in cells, and designed to provide what is commonly termed, a "flexible 40 MW" of nearly instantaneous Primary Frequency Response . . . to [Taxpayer's] customers and into the Midcontinent Independent System power grid.
>
> . . . .
>
> [The battery facility] responds to deviations in the [power grid] system frequency by converting energy from its chemical stored state into electricity and injecting the energy into the grid when system frequency falls below [] standards or withdrawing and storing energy when system frequency is too high.

Taxpayer concludes that equipment and supplies incorporated into the facility are exempt from sale tax under the "manufacturing exemption" because the equipment and supplies are utilized in the "direct production and [] injection of electricity into [the] grid.

In interpreting the applicability of the exemption sought by Taxpayer, the Department bears in mind that the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however, is strictly construed against the taxpayer*. Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

The Department does not agree that Taxpayer has met its burden of establishing by "sufficient evidence" that the battery storage facility is part and parcel of its electrical production function and that its analysis and argument meets "the exact letter of the law." *Id.* Instead, the Department concludes that the battery facility is a basic element of Taxpayer's distribution network and is "downstream" of Taxpayer's "manufacturing" or "production" of electricity. As such, Taxpayer is precluded from claiming the exemption under IC § 6-2.5-5-3(c) which specifically excludes both distribution equipment and transmission equipment.

The Department concludes that the battery facility is not involved in the direct production of Taxpayer's electricity and is not entitled to the manufacturing exemption because the battery facility involves the economics of transmission and distribution, not production. As such, Taxpayer's battery facility is not a continuation of the industrial production process, but merely part of the transmission and distribution process.

B. Lump Sum Contract.

Taxpayer states that it accrued and paid use tax on purchases from a company called Electrical Power Products. This vendor built a "permanently affixed control house" (separate from the battery storage facility addressed above) at one of Taxpayer's substations. According to Taxpayer, the vendor sold and constructed the facility pursuant to a lump sum contract and that the price it paid was for "a non-taxable lump sum construction project." Accordingly, Taxpayer seeks a refund of the tax paid pursuant to this project.

A "lump-sum" contract is an agreement by which "a single price is quoted for an entire project based on plans and specifications, covers the entire project, and the owner knows exactly how much the work will cost in advance." Lump Sum Contracts, https://en.wikipedia.org/wiki/Lump_sum_contract (Last visited November 12, 2020). *See also* Black's Law Dictionary 408 (11th ed. 2019) "A contract setting a fixed total price for a construction project."

Taxpayer relies to IC § 6-2.5-3-2(c) as authority for its position that the price it paid to Electrical Power Products is exempt from sales and use tax.

> The use tax is imposed on a contractor's conversion of construction material into real property if that construction material was purchased by the contractor. However, *the use tax does not apply to conversions of construction material described in this subsection, if:*
>
> *(1) the state gross retail or use tax has been previously imposed on the contractor's acquisition or use of that construction material;*
>
> (2) the person for whom the construction material is being converted could have purchased the material exempt from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant in a retail transaction;

or
(3) the conversion of the construction material into real property is governed by a time and material contract as described in IC 6-2.5-4-9(b). (*Emphasis added*).

Taxpayer also cited to the Department's regulation, 45 IAC 2.2-4-26(a), as further authority for its position that the Electrical Power Products payments were not subject to sales or use tax. The regulation provides:

> A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

The Department's guidance on the issue is found at Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 045060287NRA which provides in part:

> "Lump sum contract" is a contract in which all of charges are quoted as a single price.
>
> . . . .
>
> If a construction contractor purchases construction materials pursuant to a lump sum contract, the construction contractor pays either: (1) sales tax at the time the construction materials are purchased, or (2) use tax at the time the construction materials are incorporated into real property if the contractor purchased or acquired the construction materials exempt from sales tax and the owner of the real property could not have purchased the materials exempt from sales tax.

The current version of the bulletin provides:

> The purchase and use of construction material by contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract (e.g., lump sum contracts) purchase construction material for their own use or consumption in the fulfillment of contractual obligations to provide real property improvement services. As such, contractors using contracts that do not meet the definition of a time and material contract are not reselling construction material. They are therefore not eligible to purchase construction material exempt from sales tax under the sale for resale exemption. Instead, *such contractors will not charge their customers sales tax*. They should either: (1) pay sales tax at the time the construction material is purchased: or (2) self-assess and remit use tax at the time the construction material is converted into real property if that construction material was purchased or otherwise acquired without paying sales or use tax. Sales Tax Information Bulletin 60 (October 2020) *See also* Sales Tax Information Bulletin 60 (November 2017 retroactive eff. Jan. 1, 2010) 20180131-IR-045180051NRA. (*Emphasis added*).

Taxpayer provided copies of the three Electrical Power Products invoices. In each case, the invoice calls for payment to:

> Supply all design, fabrication, and delivery of one complete control house including but not limited to (30) relay panels . . . batteries, all wiring, ancilla[ry] equipment & installation services . . . .

The Department finds that Taxpayer has provided sufficient information to establish that it paid Electrical Power Products a "lump sum" amount for the construction and installation of the control house as provided under 45 IAC 2.2-4-26(a). Under such an arrangement, Electrical Power Products was responsible for self-assessing use tax or paying sales tax on the tangible personal property utilized in the project, and Taxpayer was not required to pay sales tax or self-assess use tax on the price paid the vendor. Therefore, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving that the assessment was wrong on this issue.

FINDING

Equipment and supplies installed in Taxpayer's battery storage facility are not exempt from sales tax. It was the lump-sum vendor's responsibility to pay tax on items utilized in the construction of the control house. To the extent Taxpayer self-assessed use tax on the price paid Electrical Power Products for the construction of the control house, Taxpayer is entitled to a refund or credit.

SUMMARY

Taxpayer was not required to collect sales tax on the sales of utilities to "Family Medicine" or customers for whom Taxpayer has now provided additional exemption certificates. Taxpayer is entitled to an offsetting credit of tax it

paid on the purchase of a control house but not for equipment installed in the battery storage facility. In all other respects, Taxpayer's protest is respectfully denied.

December 4, 2020

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